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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MYCHAEL TYRONE SHANNON,

Plaintiff and Appellant,

v.

BELINDA NAVARRO,

Defendant and Respondent.

F048089

(Super. Ct. No. 03C0299)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

Mychael Tyrone Shannon, in pro. per., for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Darryl L. Doke, Thomas D. McCrackin and James C. Phillips, Deputy Attorneys General, for Plaintiff and Respondent.

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Plaintiff and appellant Mychael Tyrone Shannon (Shannon) appeals from the judgment entered after the trial court granted summary judgment in favor of defendant and respondent Belinda Navarro (Navarro). We affirm.

FACTUAL AND PROCEDURAL HISTORIES

On July 30, 2003, Shannon filed this action in propria persona alleging medical malpractice and fraud against the chief psychiatrist at Corcoran State Prison and Navarro, his former psychological social worker. After the trial court granted Navarro's motion

for judgment on the pleadings, Shannon filed a second amended complaint which alleged causes of action for medical malpractice, negligence and personal injury, arising from Shannon's allegations that Navarro discharged him from the Department of Corrections's "Enhanced Outpatient Program" when his mental condition required his continued placement in the program.¹

On November 8, 2004, Navarro filed a motion for summary judgment or, alternatively, summary adjudication. Navarro asserted she was entitled to judgment as a matter of law on the following grounds: (1) all causes of action fail because Shannon cannot produce any admissible evidence to support any of his claims; (2) Shannon cannot maintain the medical malpractice cause of action because he failed to file a timely tort claim with the California State Board of Control for the medical malpractice he alleges occurred; and (3) Shannon cannot maintain the personal injury cause of action as the complaint fails to allege a cause of action upon which relief can be granted. In support of the motion, Navarro filed a separate statement of undisputed material facts, a memorandum of points and authorities, and declarations.

A hearing on the summary judgment motion was set for January 27, 2005, with trial set for February 28, 2005. On November 18, 2004, Shannon filed a motion requesting both a continuance of the trial and an "extension of time" on the hearing on the summary judgment motion, and set the hearing on his motions for the same day as the hearing on the summary judgment motion. Shannon argued there was good cause for a continuance of the hearing on the summary judgment motion as shown by his declaration, in which he stated, inter alia: (1) he was transferred from the Corcoran State Prison to the Los Angeles County State Prison on October 20, 2004; (2) on November 2,

¹ The facts regarding the complaints and their contents are taken from Navarro's summary judgment motion, as neither the complaint nor the second amended complaint is part of the appellate record.

2004, he was admitted to the infirmary for seven days, where he “underwent extensive diagnostic testing”; (3) on November 9, 2004, the prison’s chief psychiatrist, senior psychologist, and two other psychologists determined he suffered from post-traumatic stress disorder and believed he was not given the proper diagnosis while incarcerated at Corcoran State Prison; (4) he would “need to make a Title 15 CCR 3370 request for the infirmary admission and discharge records, which usually takes thirty days or more before being granted”; (5) on November 9, 2004, he was placed in “LAC EOP overflow housing,” where he was restricted to his one-man cell for eight weeks and could not visit or access the prison library; (6) that same day, he learned he would not receive his property, which failed to arrive on the bus with him from Corcoran, until the end of the eight-week period; (6) the earliest he could visit the prison library was January 4, 2005, and therefore it was “very unlikely” he could prepare a response to the summary judgment motion on or before January 27, 2005; and (7) in order to prepare a response to the motion, he would “need to obtain declarations from treating clinicians here at LAC; will need library access for research, and must obtain pertinent documents from the medical file[,]” as well his property. Shannon requested an extension of time to February 28, 2005 to prepare a response to the summary judgment motion.

On January 12, 2005, Navarro filed an opposition to Shannon’s requests for a continuance of the trial date and an extension of time to file his opposition to the summary judgment motion. In addition to filing her opposition, Navarro filed declarations of George Rippi and Alfred W. Sylva, Jr.² Based on the declarations of Rippi and Sylva, Navarro asserted that Shannon went to the prison’s “A” facility library on November 16, 2004, and its “D” facility law library on December 7, 9, 10, 14, 16, and 17, 2004, and Shannon received his property on November 19, 2004. Navarro argued the

² While Navarro’s opposition to Shannon’s motions is included in the clerk’s transcript, the declarations filed with the opposition are not.

reasons for Shannon's request for a continuance were nonexistent because Shannon had accessed the law library on numerous occasions since filing his request for continuance and received his property soon after filing his motion.

On January 26, 2005, the court, on its own motion, found that due to court calendar congestion there was good cause to continue the hearings on both Navarro's summary judgment motion and Shannon's motions to February 8, 2005. Following oral argument at the February 8 hearing, the court denied Shannon's request for a continuance and granted the summary judgment motion.

On March 25, 2005, the written order denying Shannon's motion for continuance was filed, in which the court found, in pertinent part: "After full consideration of the evidence, the Court finds that [Shannon] could have, but did not seek a continuance of the summary judgment motion on the grounds that evidence existed to oppose the motion, and that would be his medical records from Lancaster. Instead, he set a motion for continuance on the grounds of his lack of access to legal files and the prison's library, and ... it was set for the same date as the hearing on the merits of the summary judgment motion. Code of Civil Procedure Section 437(c)(h) allows for motions for continuances to obtain discovery to be obtained at any time before the opposition is due. In this case, the opposition was due on January 13, 2005. [Shannon] could have, but didn't bring a motion for continuance to obtain those medical files from Lancaster before that date, and even his own declaration states that he knew the facts underlying this request since November 17 of 2004. Exhibit B of the reply shows that there was some delay in granting the plaintiff's request for library access, but the Attorney General's Exhibit B shows that ... [Shannon] went to the library on multiple times in December of 2004, and his failure to file a motion for continuance to obtain needed documents did not have anything to do with the lack of access to the library, instead it had to do with his misapprehension that ... he could seek a continuance at any time before the date of the

hearing of the summary judgment motion, and that's shown by his reply. The plaintiff has delayed unreasonably in seeking a continuance."

The order granting Navarro's summary judgment motion, which was also filed on March 25, stated the court found there were no triable issues of material fact because Shannon "failed to file a declaration from medical professionals which would create a triable issue of fact in this professional malpractice action."

On February 14, 2005, Shannon filed a "motion to vacate" the order granting summary judgment. Shannon argued the court erred in granting the motion because he could establish his medical malpractice claim based on the testimony of lay witnesses, whose declarations he filed along with the motion. Navarro opposed the motion, arguing the motion was premature because no order or judgment had yet been entered, and expert testimony was required to establish the standard of care in this case. A hearing on the motion was held on March 10, 2005. The written order denying the motion explained that the court construed the motion as one for reconsideration pursuant to Code of Civil Procedure section 1008, which it denied because Shannon did not provide a declaration containing new facts that could not have been presented at the hearing on the summary judgment motion.

DISCUSSION

Shannon raises three contentions in this appeal: (1) the court abused its discretion when it denied his request for a continuance of the hearing on the summary judgment motion; (2) his failure to file an opposition was not due to any fault of his own because he prepared an opposition which prison authorities lost; and (3) the court erred in granting summary judgment because he can prove his medical malpractice claim through lay testimony.

The Request for Continuance

Shannon first contends the trial court abused its discretion in denying his request for a continuance so he could prepare an opposition to the summary judgment motion. It

is apparent from the trial court's order denying the motion that Shannon filed a reply brief with respect to his motion, which the trial court relied on in making its decision. Although Shannon's motion and Navarro's opposition are included in the clerk's transcript, the reply brief is not. Without the reply brief, we cannot review the trial court's decision to deny the request for continuance. When we review a trial court's judgment or order, we presume it is correct unless the appellant demonstrates otherwise. "A ruling by a trial court is presumed correct, and ambiguities are resolved in favor of affirmance. [Citations.] The burden of demonstrating error rests on the appellant." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632.) An appellant must demonstrate error by providing an adequate record. "The party seeking to challenge an order on appeal has the burden to provide an adequate record to assess error. [Citation.] Where the party fails to furnish an adequate record of the challenged proceedings, his claim on appeal must be resolved against him. [Citations.]" (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46.)

In an attempt to rectify his failure to designate the reply brief as part of the clerk's transcript, Shannon has requested in his opening brief that we take judicial notice of the reply brief, a purported copy of which he attached to the opening brief. Before an appellate court can take judicial notice of a document or other record from the trial court, however, the appellate court must be assured as to its authenticity. (*People v. Preslie* (1977) 70 Cal.App.3d 486, 494; *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 743.) Therefore, a party requesting judicial notice of such a document "should furnish the appellate court with a copy of such document or record certified by its custodian." (*Ross v. Creel Printing & Publishing Co.*, *supra*, 100 Cal.App.4th at p. 743.) Where this is not done, the appellate court properly may strike the documents and all references to them. (*People v. Preslie*, *supra*, 70 Cal.App.3d at p. 495.) While Shannon has provided us with a copy of the reply brief, it does not contain a file stamp showing it was filed with the court and is not certified by the court

custodian. Accordingly, we need not consider the reply brief as part of the appellate record, and on that ground, may find that Shannon failed in his burden of demonstrating error.

Even if we were to consider the merits of Shannon's contention that the trial court erred in failing to grant a continuance, with or without the reply brief as part of the record, his contention fails. The decision to grant or deny a continuance involving the hearing date of a motion for summary judgment lies within the sound discretion of the court. (*Mahoney v. Southland Mental Health Associates Medical Corp.* (1990) 223 Cal.App.3d 167, 171-172; accord *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 314.) "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.] (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

There is no right to a continuance as a matter of law. (*Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 648; accord *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547.) An exception is created by Code of Civil Procedure section 437c, subdivision (h), which "mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing.... [Citations.] Thus, in the absence of an affidavit that requires a continuance ..., we review the trial court's denial of appellant's request for a continuance for abuse of discretion. [Citation.]" (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.) "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated." (*Roth v. Rhodes, supra*, 25 Cal.App.4th at p. 548.) To

mandate a continuance, an affidavit must demonstrate “(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]” (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.)

Here, the trial court found that when Shannon requested the continuance in November 2004, he did so on the basis that he could not prepare a timely opposition to the motion because he did not have access to the law library as he was restricted to his cell for eight weeks and he did not have his property.³ In her opposition, Navarro showed that Shannon did access the law library before his opposition was due and obtained his property shortly after filing his request for continuance with the court. Given these facts, the trial court did not abuse its discretion in denying the request for continuance on this ground, as Shannon did not show his ability to prepare an opposition was hampered in any way.

In Shannon’s reply brief, he stated the reason he needed a continuance had changed from when he initially filed his motion, as he was having difficulty obtaining his medical records so he could prepare the declarations of his treating clinicians.⁴ In making this request, which was essentially one for additional time to conduct discovery, Shannon failed to satisfy the requirements of Code of Civil Procedure section 437c, subdivision (h), as he failed to explain why the facts he expected to obtain from his medical records and treating clinicians were essential to opposing the motion or why

³ Shannon acknowledged this was the basis for his request for continuance in his reply to Navarro’s opposition to his request for continuance.

⁴ Shannon stated he asked his treating clinicians on November 17, 2004, to provide expert declarations verifying his mental health illness and treatment, which they agreed to provide, and that he made several attempts to obtain his mental health records as supporting evidence to the declarations, but had not yet been provided them. Shannon, however, did not submit any declarations from the treating clinicians stating they were in fact willing to provide declarations or what they would say.

those facts could not have been presented in opposition to the motion (see *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 101.) Although Shannon explained the clinicians would say he was not given a “proper diagnosis” while at Corcoran State Prison and he “should not have been made CCCMS,” he did not state whether they were of the opinion Navarro acted below the standard of care in any way. The declaration in support of the request thus failed to satisfy the requirement that it show “facts essential to justify opposition may exist.” (Code Civ. Proc., § 437c, subd. (h); *Roth v. Rhodes, supra*, 25 Cal.App.4th at p. 548.)

Moreover, as the trial court observed, Shannon’s request for a continuance based on the need for further discovery was untimely. The statute authorizes continuance requests in an affidavit submitted in opposition to a motion for summary judgment or “by ex parte motion *at any time on or before the date the opposition response to the motion is due.*” (Code Civ. Proc., § 437c, subd. (h), italics added.) Shannon’s request for a continuance based on the need for discovery within one week of the hearing date was thus untimely under the statute. (See *Cooksey v. Alexakis, supra*, 123 Cal.App.4th at pp. 252, 255 [attorney declaration submitted the day of the hearing was not timely].) The hearing on the summary judgment motion was set more than 10 weeks after Navarro filed her motion, yet Shannon waited until the last minute before raising Code of Civil Procedure section 437c, subdivision (h), and offered no explanation for his delay. No abuse of discretion occurred.

The Summary Judgment Motion

Shannon raises two arguments with respect to the summary judgment motion itself. First, Shannon asserts it was not his fault that he failed to timely file an opposition to the motion because he prepared a handwritten opposition to the motion on January 23, 2005, which he gave to prison officials to mail, but the opposition was never mailed. Shannon argues the “interference by prison officials” precluded him from timely filing an opposition to the motion by January 27, 2005. Shannon claims he never raised this issue

with the trial court because he was required to exhaust an administrative appeal before doing so.⁵ This argument fails for two reasons: (1) the opposition would have been untimely, as it would have been filed less than 14 days before the January 27 hearing date, as required by Code of Civil Procedure section 437c, subdivision (b)(2); and (2) there is nothing in the record showing he informed the trial court he had prepared an opposition which was lost in the mail. As this point was not raised in opposition to the summary judgment motion below, we will treat it as waived. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29 [failure to raise issue below results in a waiver of point on appeal].)

Shannon's second argument is that the trial court erred in granting the summary judgment motion because expert testimony is not required to establish his medical malpractice claim. Shannon asserts his claim can be evaluated based on common knowledge, therefore malpractice can be established through either Navarro's or his own testimony. Shannon, however, did not designate the second amended complaint as part of the clerk's transcript on appeal. Without the complaint, we cannot review his claim, as the first step in reviewing a grant of a summary judgment motion is to "identify the issues framed by the pleadings since it is these allegations to which the motion must respond...." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.) Having failed to provide us with an adequate record with which to review his claim, we must resolve this issue against him. (*Rancho Santa Fe Assn. v. Dolan-King, supra*, 115 Cal.App.4th at p. 46.)

⁵ Shannon has requested us to take judicial notice of a complaint he filed in United States District Court for the Central District of California in July 2005 over the missing mail. This evidence is irrelevant to whether the court erred in granting summary judgment since it was not before the court when it granted the motion. Accordingly, we deny the request for judicial notice. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 559, fn. 3; *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1061-1062 [only relevant material may be judicially noticed].)

Shannon asserts for the first time in his reply brief that we should appoint a psychologist to conduct an independent psychological evaluation of him to assist us in reviewing this case, or remand the case to the trial court with instructions to order such an assessment. Shannon never made such a request below. We therefore treat the argument as waived. (See *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 351 [argument raised for the first time in the litigation in appellant’s reply brief is “doubly waived”].)

DISPOSITION

The judgment is affirmed.

Gomes, Acting P.J.

WE CONCUR:

Dawson, J.

Hill, J.